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9 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 In re Silver Wheaton Corp.
11 Securities Litigation

Master File No. 2:15-cv-05146-
CAS-JEM

CLASS ACTION

12 **LEAD PLAINTIFFS’**
13 **OPPOSITION TO**
14 **DEFENDANTS’ REQUEST**
15 **FOR JUDICIAL NOTICE IN**
16 **SUPPORT OF DEFENDANTS’**
17 **MOTION TO DISMISS AND**
18 **NOTICE OF**
19 **INCORPORATION BY**
20 **REFERENCE (Doc. No. 62)**

21 JUDGE: Hon. Christina A. Snyder
22 Date: May 16, 2016
23 Time: 10:00 a.m.
24 Dept: 5 – 2nd Floor
25 Before: Hon. Christina A. Snyder

26 Complaint Filed: July 8, 2015

1 Lead Plaintiff Joe Elek, and named Plaintiffs Thomas Bartsch, Jeffrey Frohwerk,
 2 Larry Brandow, Diana Choi, Ben Potaracke, Charles Montgomery, Jędrzej
 3 Borowczyk, and Charles Remmel (together “Plaintiffs”) oppose Defendants Silver
 4 Wheaton Corp. (“SW” or the “Company”), Randy V.J. Smallwood, Peter Barnes, and
 5 Gary Brown (collectively, “Defendants”) Request For Judicial Notice In Support Of
 6 Defendants’ Motion To Dismiss And Notice Of Incorporation By Reference (dkt. #
 7 62) (the “Motion to Dismiss”), to the extent Defendants proffer the exhibits for the
 8 truth of the matter asserted therein.

9 While a court may take judicial notice of the existence of public records, it cannot
 10 take judicial notice of facts stated in the public records. *Lee v. City of Los Angeles*,
 11 250 F.3d 668, 690 (9th Cir. 2001) (reversible error to take judicial notice of court
 12 opinion for truth of facts asserted therein); *In re Am. Apparel, Inc. S'holder Litig.*, 855
 13 F. Supp. 2d 1043, 1062 (C.D. Cal. 2012) (taking judicial notice of SEC filings, but
 14 not for truth of the matter asserted therein). Indeed, if the rule were otherwise,
 15 defendants accused of fraud could cite their own self-serving denials in another forum
 16 to defeat a complaint. Thus, the Court cannot take judicial notice of any of the
 17 documents the Defendants proffer for the truth of their contents. In addition, the
 18 Court cannot rely on the following “facts” in deciding Defendants’ motion to dismiss:

- 19 • SW Cayman actually paid fees to SW Canada totaling more than
 20 CDN\$33 million. Memorandum of Points and Authorities In Support of
 21 Defendants’ Motion to Dismiss Amended Complaint (“Def. Br.”), at 4.
- 22 • SW relied on transfer pricing studies prepared by
 23 PricewaterhouseCoopers (“PWC”) – Def. Br., at 2, 4, 9, 14, 23
- 24 • SW Canada received a total return of 20% on its costs. Def. Br., at 4-5.
- 25 • SW’s auditor was aware of the Company’s tax position. Def. Br., at 11.

26 Indeed, Defendants principally rely on Silver Wheaton’s own Notice of Appeal
 27 to the Tax Court of Canada in *Silver Wheaton Corp. v. The Queen*, Case No. 2016-
 28 77(IT)G, dated January 8, 2016, attached as Exhibit I to the Declaration of Amanda

1 Heale (Dkt. # 61-18) (the “Notice of Appeal”). It is well established that “[a] motion
 2 is a legal brief, advancing a partisan position in litigation, not a judicially noticeable
 3 fact.” *Cactus Corner, LLC v. U.S. Dep’t of Agric.*, 346 F. Supp. 2d 1075, 1099 (E.D.
 4 Cal. 2004) (quoting *George W. v. U.S. Dep’t of Educ.*, 149 F. Supp. 2d 1195, 1199
 5 (E.D. Cal. 2000)). SW’s claim to have relied on PWC’s report, in particular, raises a
 6 host of questions, none of which can be answered before discovery, such as:

- 7 • Was there in fact a PWC report?
- 8 • What was the basis of the PWC report?
- 9 • Did PWC know all the facts?
- 10 • Did SW conceal any facts from PWC?
- 11 • Did PWC rely on any assumptions or express any caveats?
- 12 • Did Defendants have any reason to believe that PWC’s position was
- 13 inaccurate?
- 14 • Did PWC retract its position after the CRA began its audit?
- 15 • Did the CRA’s visit offer Defendants any reason to doubt the accuracy
- 16 of the PWC report?
- 17 • Did the CRA offer any criticisms of the PWC report?

18 And so on.

19 However, the Court can take judicial notice of the statements made in SW’s
 20 Notice of Appeal. Defendants’ Defendants’ brief is an admission against interest.
 21 Defendants admit that the basis of SW’s tax position was that SW Cayman
 22 purportedly paid SW Canada CDN\$33 million (whether or not it was actually paid,
 23 and whether or not it was supported by a PWC study, and whether or not the PWC
 24 study was reliable and/or fully informed).

1 **CONCLUSION**

2 For the foregoing reasons, the Court should not take judicial notice of
3 Defendants' exhibits for the truth of the matter asserted, but should take judicial
4 notice of them as setting out Defendants' tax position.

5
6 Dated: March 4, 2016

Respectfully submitted,

7 **THE ROSEN LAW FIRM, P.A.**

8
9 /s/ Laurence M. Rosen

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CERTIFICATE OF SERVICE

I, Laurence Rosen, hereby declare under penalty of perjury as follows:

I am attorney with the Rosen Law Firm, P.A., with offices at 355 South Grand Avenue, Suite 2450, Los Angeles, CA, 90071. I am over the age of eighteen.

On March 4, 2016, I electronically filed the foregoing **LEAD PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND NOTICE OF INCORPORATION BY REFERENCE** with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to counsel of record.

Executed on March 4, 2016.

/s/ Laurence Rosen

Laurence Rosen